(Capital Case)

No. 17-1107

In The
Supreme Court of the United States

MIKE CARPENTER, Interim Warden,
Oklahoma State Penitentiary,

Petitioner,

v.

PATRICK DWAYNE MURPHY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF FOR NATIONAL CONGRESS OF AMERICAN INDIANS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE[1]

The National Congress of American Indians (NCAI) is the oldest and largest organization addressing American Indian interests. Since 1944, NCAI has worked with tribal governments to strengthen their governmental institutions and enable them to better serve both tribal citizens and non-citizens. In particular, NCAI has worked with Congress to enhance law enforcement and improve law and order in tribal communities. NCAI has also worked closely with federal, state and local governments to develop productive models of intergovernmental cooperation to serve all persons within reservation boundaries. NCAI has a strong interest in preserving time-honored principles of Indian law, including the test for reservation disestablishment, which has been relied upon by Indian tribes and lower federal courts for decades.

SUMMARY OF ARGUMENT

In eight decisions spanning 54 years, this Court has articulated the test for determining whether an Indian reservation has been disestablished. *E.g.*, *Nebraska v. Parker*, 136 S. Ct. 1072 (2016); *Seymour v. Superintendent*, 368 U.S. 351 (1962). Under this "well settled" precedent, "'only Congress can divest a

[1] No counsel for either party authored this brief in whole or in part, and no person other than amicus curiae or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this amicus brief.

reservation of its land and diminish its boundaries,' and its intent to do so must be clear." *Parker*, 136 S. Ct. at 1078-79 (quoting *Solem v. Bartlett*, 465 U.S. 463, 470 (1984)). In determining congressional intent, statutory language is "of course" the "most probative evidence." *Id.* at 1079 (quoting *Hagen v. Utah*, 510 U.S. 399, 411 (1994)). Although other evidence may be considered, in the absence of a "clear textual signal," such evidence must "'unequivocally reveal'" widespread contemporaneous understanding that the reservation would be disestablished. *Id.* at 1080 (quoting *Solem* at 471).

The Petitioner and his amici ask this Court to depart from this established test. Their arguments are retreads of those rejected in *Parker* just two years ago. The statutes at issue here contain "none of the[] hallmarks of diminishment," 136 S. Ct. at 1079, or similarly explicit language, yet Petitioner claims that subsequent jurisdictional history and the alleged impact of reservation status require altering the long-settled test to suit them. *Compare* Pet'r's Br. 3-4 (alleging the lower court erred by being "[s]ingularly fixated" on statutory language because state officials had exercised jurisdiction for 111 years and affirmance would cause "turmoil") *with* Pet'r's Br. 20-22, Nebraska v. Parker, 136 S. Ct. 1072 (2016) (No. 14-1406) (claiming statutory language was not important because state officials had exercised jurisdiction over the area for over a century and affirmance would "significantly disrupt" the community).

These arguments must be rejected. Emphasis on statutory language is appropriate because Congress is

the constitutional body charged with authority over Indian affairs and federal territory. Disestablishment of the reservation would abrogate the terms of a treaty and reallocate governmental authority, both actions which have always required clear and plain statements by Congress. *See, e.g.*, *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2032 (2014). There is also nothing about Creek history that permits departure from the Court's well-settled analytical structure. As Petitioner admitted below,[2] the Creek possessed a reservation established by treaty and which was consistently recognized by the Executive Branch, Congress, and the courts. Section I(B)&(C), *infra*. The statutes alleged to terminate that reservation also fit comfortably within the framework addressed under the established test for "surplus land acts." Section I(D), *infra*. Moreover, when Congress enacted these statutes, it was clear that statehood, state jurisdiction, and federal control over tribal institutions were fully consistent with reservation status. Section I(E), *infra*.

Even though *Parker* reaffirmed that the alleged negative impact of reservation status does not permit judicial rewriting of history, 136 S. Ct. at 1081-82, Petitioner's amici devote much of their argument to speculating about alleged negative impacts.[3] Their

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[2] Resp't-Appellant Br. at 11-12, *Murphy v. Royal* ("Respondent [Petitioner on certiorari] agrees that Petitioner committed the murder within the boundaries of the Muscogee (Creek) Reservation.").

[3] Amici repeatedly cite *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197 (2005), and the "justifiable expectations" of state and local governments, *e.g.*, Brief for Nebraska et al., as

overblown claims are not just legally irrelevant, they are divorced from the realities of federal Indian law. Under existing jurisprudence, jurisdiction over almost all non-Indian activities on fee land will remain unchanged: tribes will not have jurisdiction, and states and local governments will. Section II(A), *infra*. Indeed, the experience of communities throughout the country shows that with intergovernmental cooperation, reservation status can increase economic opportunities and improve governmental services for both tribal and non-tribal citizens. Section II(B), *infra*.

ARGUMENT

I. SUPREME COURT PRECEDENT ON RESERVATION BOUNDARIES FULLY APPLIES TO THE STATUS OF THE CREEK RESERVATION.

The well-settled test for determining whether Congress has disestablished reservation boundaries fully applies here. The test simply implements the mandate to construe statutes in accordance with congressional intent, and to require clear evidence before finding Congress has invaded traditional governmental authority. Clear evidence is required here because solemn treaty promises made by the United States

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Amici Curiae Supporting Petitioner at 9, 13, 25, ignoring *Parker*'s instruction that *Sherrill* is irrelevant to the "single question of diminishment" raised by Petitioners here as in *Parker*. *Parker*, 136 S. Ct. at 1082.

established a reservation for the Creek Nation. These statutes are well within the class of allotment statutes that the *Solem* test was designed to interpret, and nothing about Oklahoma statehood or Creek history undermines that fact.

A. The Established Test Protects the Division of Authority Between Congress and the Court.

Petitioner would have this Court believe that its test for determining whether Congress has altered reservation boundaries is something idiosyncratic, appropriate only for some sui generis group of statutes. It is not. At its heart, the reservation boundary test, with its focus on statutory language and other unequivocal evidence of congressional intent, simply implements the constitutional division of responsibility between Congress and the courts, as well as the need for clear evidence before finding Congress intended to invade traditional governmental boundaries.

From its earliest years, the Supreme Court has recognized that "the duty of the court [is] to effect the intention of the legislature." *Schooner Paulina's Cargo v. United States*, 11 U.S. 52, 60 (1812). This duty derives from the Constitution itself, and the allocation of "[a]ll legislative Powers" to Congress. U.S. Const. art. I, § 1; *Bank One Chi., N.A. v. Midwest Bank & Trust Co.*, 516 U.S. 264, 280 (1996) (Scalia, J., concurring in part and concurring in the judgment). In the diminishment test, "[a]s with any other question of statutory

interpretation," the statutory text is the most important part of this analysis. *Parker*, 136 S. Ct. at 1080 (citing *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989)); *accord Pennington v. Coxe*, 6 U.S. 33, 52 (1804) (Marshall, C.J.) ("[A] law is the best expositor of itself").

Where Congress is alleged to have changed reservation boundaries, the importance of statutory text is enhanced by requirement of a "clear statement before courts will find congressional displacement of the usual allocation of institutional authority." *See* Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv. L. Rev. 405, 458 (1989); *see also* Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 Harv. L. Rev. 381, 415-17 (1993) (discussing application of this rule to Indian affairs). In such cases, "the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Bond v. United States*, 134 S. Ct. 2077, 2089 (2014). Like treaties with Indian tribes, for example, treaties with foreign nations "will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed." *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984). Similarly, courts will not interpret federal jurisdiction to operate extraterritorially unless "the affirmative intention of the Congress [is] clearly

expressed," *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010), or find that statutes of limitations deprive courts of jurisdiction absent a "clear statement" of congressional intent to achieve this "unique" disruption of judicial authority. *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153 (2013).

Indian affairs, like these other areas adjusting sovereign authority, is an area where courts must tread carefully absent clear evidence of congressional intent. The Constitution vests Congress with authority over Indian affairs through the commerce, war, and territorial powers, U.S. Const. art. I, § 8, cls. 3 & 11-12; *id.* at art. IV, § 3, cl. 2, and together with the Executive through the treaty power. *Id.* at art. II, § 2, cl. 2; *see Lara*, 541 U.S. at 200-04 (finding authority in the commerce and treaty powers); *United States v. Celestine*, 215 U.S. 278, 284 (1909) (locating authority in the territorial power); *Worcester v. Georgia*, 31 U.S. 515, 558-59 (1832) (finding authority in the war, treaty, and commerce powers). The Indian affairs power, therefore, emphatically belongs to Congress, not the judiciary. *See Lara*, 541 U.S. at 200 (noting that "we have consistently described" Congress' Indian affairs powers "as plenary and exclusive.").

Where a statute is alleged to invade traditional tribal authority, moreover, the courts' interpretive role is tempered by "the profound importance of the tribes' pre-existing sovereignty." *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1873 n.5 (2016). Therefore, for almost two hundred years, this Court has demanded evidence of clear congressional intent before finding

termination of tribal rights. *See Worcester*, 31 U.S. at 554 (stating that had Cherokee treaty been intended to remove tribal self-governance "it would have been openly avowed"). The demand for clear evidence was reaffirmed in the allotment era. *See Ex Parte Crow Dog*, 109 U.S. 556, 572 (1883) (asserting federal jurisdiction over reservations "requires a clear expression of the intention of congress"); *Celestine*, 215 U.S. at 290-91 (stating that allotment act must "be construed in the interest of the Indian" to continue guardianship absent "clear" evidence of congressional intent). In the modern era, it has become a mainstay of federal Indian law. *Parker*, 136 S. Ct. at 1079-80 (demanding "clear" and "unequivocal" evidence); *Bay Mills*, 134 S. Ct. at 2031 (requiring "clear" and "unequivocal[ ]" evidence); *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 765 (1985) (demanding "unmistakably clear" evidence); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60 (1978) ("[P]roper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent.").

Petitioner and his amici would have the Court chart a unique course in construing the allotment statutes at issue here, divorcing them from their text and traditional rules of construction. The Court should not accept this invitation. Two hundred years of case law and respect for the traditional allocation of institutional authority, rooted in the Constitution itself, forbid it.

B. The Creek Nation had a Reservation Before Allotment.

Because they cannot win under existing precedent, Petitioner and his amici make a last-ditch attempt to evade it by claiming the United States never established a reservation for the Creek Nation. Pet'r's Br. 5, 19, 23-24; Petroleum Amicus Br. 2, 9-12. It would be a cruel joke if the territory solemnly guarantied the Creek Nation in exchange for leaving its eastern homelands and walking the Trail of Tears did not have protected reservation boundaries. But, of course, this is not the case. By the time Congress enacted the statutes at issue here, "reservation" had taken on its modern meaning as an area "set apart . . . for residence of the tribe of Indians by the United States," *United States v. Kagama*, 118 U.S. 375, 383 (1886), where jurisdiction was "independent of any question of title," *United States v. Thomas*, 151 U.S. 577, 579 (1894), and whose boundaries could only be altered by Congress. *Celestine*, 215 U.S. at 284. Courts, Congress, and the executive all agreed that the treaties with the Creek Nation established a reservation in this sense.

The term "reservation" was derived from public land law and referred to any tract of land set aside by the government for a specific purpose. *Celestine*, 215 U.S. at 284; Henry Campbell Black, *A Law Dictionary* 1026 (2d ed. 1910). Public authorities, therefore, used the term reservation to describe everything from naval timber reserves, Act of Mar. 1, 1817, ch. 22, 3 Stat. 347,

to lead mines, *United States v. Gear*, 44 U.S. 120 (1845), to individual lands for veterans, and salt licks for the public. *Edwards' Lessee v. Darby*, 25 U.S. 206 (1827).

Indian treaties of the 1830s often used "reservation" to refer to lands set aside for any individual or public purpose. *E.g.*, Treaty with the Choctaw, arts. XIV, XV, XVII, XIX, 7 Stat. 333 (1830) (describing individual "reservations" for various Choctaws and non-Choctaws); Treaty with the Cherokee, arts. III, IV & XIII, 7 Stat. 478 (1835) (describing military reservations, reservations to individual mixed-bloods, and for missionaries). The 1832 Treaty with the Creeks does this as well, describing an "agency reserve" and temporary individual "reserves" in the ceded lands east of the Mississippi. Treaty with the Creeks, art. II, 7 Stat. 366 (1832). The Treaty also "solemnly guarantied" the Creek a territory west of the Mississippi, where "they shall be allowed to govern themselves." *Id.* at art. XIV. The following year, another treaty was executed specifically "to establish boundary lines" for these Creek lands. And while this 1833 treaty did not use the term "reservation," it created one by setting aside the land as a "permanent home to the whole Creek nation," and setting forth the precise boundaries in geographic terms. Treaty with the Creeks, pmbl. & art. II, 7 Stat. 417 (1833); *see also* Ann. Rep. of the Comm'r of Indian Aff., S. Exec. Doc. No. 31-1, 36 (1850) (describing reservations as "permanent homes" with "well-defined boundaries"); Ann. Rep. of the Comm'r of Indian Aff., S. Exec. Doc. No. 34-1, 338 (1855) (same).

It became more common in the 1850s to use the term "reservation" to refer to tribal territories, but the word was just becoming a term of art, and many reservations were created without using that term. *See, e.g.*, Treaty with the Menominee, art. II, 10 Stat. 1064 (1854) (creating a reservation by setting aside land "to said Indians for a home"); *Menominee Tribe v. United States*, 391 U.S. 404, 405 (1968) (acknowledging that the "Menominee Tribe of Indians was granted a reservation in Wisconsin by the Treaty of Wolf River in 1854"). It is thus not surprising that federal documents of this period refer to the Creek territory not only as a reservation but as "Creek country." *E.g.*, Treaty with the Creeks, etc., art. II, 11 Stat. 699 (1856); Ann. Rep. of the Comm'r of Indian Aff., S. Exec. Doc. No. 34-5 (1856). Even more than the term reservation, "Creek country" signifies the distinct boundaries and jurisdictional status relevant in this case. As this Court held with respect to the similar treaty lands of the Cherokee Nation, the territory "ha[d] been assigned to them by the United States, as a place of domicile for the tribe, and they hold and occupy it with the assent of the United States, and under their authority." *United States v. Rogers*, 45 U.S. 567, 572 (1846).

By the late nineteenth century, the definition of the term "Indian reservation" was well-established. Congress tied jurisdiction to reservation status, Act of July 31, 1882, ch. 360, 22 Stat. 179, 179 (amending Indian trader statutes to apply "on any Indian reservation"); Major Crimes Act, ch. 341 § 9, 23 Stat. 362, 385 (1885) (authorizing federal criminal prosecutions for

certain crimes committed "within the limits of any Indian reservation"), and this Court followed Congress' lead by holding that all land within reservation boundaries—regardless of land ownership—was subject to federal jurisdiction. *Thomas*, 151 U.S. at 585. It is this definition that is relevant in reservation boundary cases like this one.

Congress and the Executive Branch now regularly referred to the "Creek Reservation" when describing the boundaries of Creek territory. For example, the 1866 Treaty with the Creek Nation refers to Creek lands as a "reduced Creek reservation," Treaty with the Creek Indians, art. IX, 14 Stat. 785, 788 (1866), as does an 1866 Treaty with the Cherokee Nation. Treaty with the Cherokee, art. IV, 14 Stat. 799, 800 (1866). Congress and the executive also repeatedly referred to these treaty boundaries as defining the "Creek Reservation." *E.g.*, Cong. Globe, 42nd Cong., 1st to 3d Sess. 763-65, 1258, 2117 (1873) (repeatedly referring to the "Creek Reservation" and the "Creek Indian Reservation" in discussing a bill authorizing "negotiat[ion] with the Creek Indians for the cession of a portion of their reservation occupied by friendly Indians"); 11 Cong. Rec. 2351 (1881) (discussing a map showing a "dark line running north and south represent[ing] the dividing line between the Creek reservation and their ceded lands").[4]

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[4] The Creek reservation appeared on Department of Interior maps through 1918. *See* JA79-117 (through 1914); http://www.mcnnsn.gov/wp-content/uploads/Attorney%20General/Interior%20Reservation%20Maps%201915-1917.pdf (1915-17).

Courts also repeatedly recognized that distinct jurisdictional rules applied on the Creek Reservation regardless of land ownership. In 1900, the Court of Appeals for the Indian Territory held that the Creek territory was a reservation:

> The contention that the Creek Nation is not now an Indian reservation is not tenable. . . . [N]or can it be successfully maintained that because the United States [gave the Creeks] a fee-simple title thereto . . . it is not in possession of the Creeks as an Indian reservation.

Maxey v. Wright, 54 S.W. 807, 810 (1900). In 1905, the Eighth Circuit upheld Creek authority to tax non-Indian activities on fee lands on the reservation, holding that it was "beyond debate" that the Nation retained "authority to fix the terms upon which noncitizens might conduct business within its territorial boundaries guarantied by the treaties of 1832, 1856, and 1866." *Buster v. Wright*, 135 F. 947, 949, 951 (8th Cir. 1905).

When Congress enacted the statutes at issue here, in other words, Congress, the courts, and the executive all recognized that the Creek Nation had a reservation. There must, therefore, be evidence of clear congressional intent before those treaty-prescribed boundaries are altered.

C. Fee-Simple Ownership is Completely Consistent with Reservation Status.

Contrary to the suggestions of Petitioner and his amici, fee-simple ownership is in no way inconsistent

with reservation status. *Cf.* Pet'r's Br. 5, 19; Petroleum Amicus Br. 2. Petitioner's statement that "[i]n a traditional reservation, the federal government holds title to the land in trust on behalf of the tribe," Pet'r's Br. 23-24, relies on a non-legal website, which Petitioner follows by citations to sources that fail to support the proposition.[5] Actual legal sources, however, establish that fee-simple ownership does not undermine reservation status. Indeed, fee patents were intended to *enhance* federal protection for Creek boundaries, and this Court later held that Creek fee lands had the same status as other tribal lands.

Throughout the nineteenth century, reservations were created using many different forms of land tenure.[6] *Cohen's Handbook of Federal Indian Law* notes

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[5] The Petitioner claims to find this proposition in a Bureau of Indian Affairs "Frequently Asked Questions" page. Pet'r's Br. 24. This misreads the website and is directly contradicted by the controlling statute, which provides that reservation status exists "notwithstanding the issuance of any patent." 18 U.S.C. § 1151(a). To support this misreading, Petitioner cites *Spalding v. Chandler*, 160 U.S. 394 (1896), whose only reference to "trust" is the non-Indian plaintiff's unsuccessful attempt to have lands removed from an "Indian reserve" and put in trust for him, and the 2012 edition of *Cohen's Handbook of Federal Indian Law*, whose cited pages actually state that reservations include unrestricted fee land. *Cohen's*, *supra*, § 3.04[2][c][ii] at 190-92.

[6] Many treaties fix boundaries without saying anything about land tenure. *See, e.g.*, Treaty with the Kickapoos, art. II, 7 Stat. 202 (1819). Other treaties set apart land for "use and occupation" of the tribes. *See, e.g.*, Treaty with the Navajo, art. II, 15 Stat. 667 (1868). Still other treaties provide that reservations would contain all individually-owned allotted land from their inception. *See, e.g.*, Treaty with the Oneidas, 7 Stat. 566 (1838); Treaty with the Chippewa, arts. II-III, 14 Stat. 637 (1864).

that the "language used to define the character of the estate guaranteed to a tribe by treaty varied so considerably that any detailed classification would not be useful." § 15.04[3][a] at 1006. Use of the term "trust" to describe a specific form of land tenure, moreover, was not common in the treaty period, and did not appear in a general statute until the 1887 General Allotment Act (GAA). *Id.* § 15.03 at 998 (citing GAA, ch. 119, 24 Stat. 388).

Cohen's Handbook lists grants in fee simple first in describing common forms of reservation land tenure. *Cohen's*, *supra*, § 15.04[3][a] at 1006. The Creek Nation, therefore, was hardly "unique." *Cf.* Pet'r's Br. 5. Multiple treaties other than those with the Five Tribes established reservations to be held in fee simple. *E.g.*, Treaty with the New York Indians, art. II, 7 Stat. 550 (1838) (setting apart land "[t]o have and to hold the same in fee simple to the said tribes or nations of Indians"); Treaty with the Senecas & Shawnees, art. II, 7 Stat. 411 (1832) (granting lands "in common . . . in fee simple; but the lands shall not be sold or ceded without the consent of the United States"); Treaty with the Wyandots, etc., art. VI, 7 Stat. 160 (1817) (granting "by patent, in fee simple" reservations for the Wyandot, Seneca, and Shawnee tribes). Such reservations, moreover, were created and ceded with the same formalities as any other reservation. *E.g.*, Treaty with the Seneca, arts. I-II, 7 Stat. 348 (1831) (providing for cession of fee-simple reservation granted under prior treaty and grant of 67,000 acres "by patent, in fee simple, as long as they shall exist as a nation and remain on the same").

Petitioner's suggestion that fee simple is inconsistent with reservation status is particularly bizarre because the definition of reservation emerged at a time when allotment meant that many reservation lands would be held in fee simple. The 1882 act found not to diminish the Omaha reservation in *Parker*, for example, provided that after twenty-five years allotments would be conveyed to the allottees "in fee." Act of Aug. 7, 1882, ch. 434, § 6, 22 Stat. 341, 342. Not long thereafter, in *Celestine*, the Court held that reservations included fee-patented land, 215 U.S. at 284, and Congress codified this longstanding consensus in the Indian Country Act. 18 U.S.C. § 1151(a).

Indeed, far from being a lesser form of tribal ownership, when the federal government granted the Creek Nation its lands, fee-simple status was believed to create *more* federal protection for tribal lands. After *Johnson v. M'Intosh* ruled that the doctrine of discovery gave the United States "absolute ultimate title" in tribal lands, 21 U.S. 543, 592 (1823), some argued that this title was inconsistent with tribal sovereignty. *See, e.g.*, *Cherokee Nation v. Georgia*, 30 U.S. 1, 22 (1831) (Johnson, J., dissenting); *but see Mitchel v. United States*, 34 U.S. 711, 746 (1835) (declaring the Indian "right of occupancy . . . as sacred as the fee simple of the whites"). To help persuade tribes to cede their eastern lands, therefore, the Indian Removal Act authorized the President to provide tribes with fee patents to help "solemnly to assure the tribe or nation . . . that the United States will forever secure and guaranty [their lands] to them." Indian Removal Act, § 3, 4 Stat. 411,

412 (1830). Relying on such promises, both the Creek and Cherokee Nations later argued that their fee patents limited federal authority over their lands. *See United States v. Creek Nation*, 295 U.S. 103, 109-10 (1935); *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 307-308 (1902) (fee patents did not prevent the U.S. from issuing oil leases on Cherokee lands); *Cherokee Nation v. S. Kan. Ry. Co.*, 135 U.S. 641, 656 (1890) (fee status did not prevent United States from granting railroad right-of-way). The Supreme Court, however, found that the lands had the same status as other tribal lands: they were under the "control and management of [the federal] government," and "subject to limitations inhering in such a guardianship." *Creek Nation*, 295 U.S. at 109-10.

Generations of treaties, judicial decisions, and congressional acts establish that fee ownership is consistent with reservation status. Petitioner's invitation to find otherwise should be declined.

D. This Court Created the Disestablishment Test to Interpret Statutes Like These.

The statutes at issue here fit neatly within *Solem*'s description of "surplus land acts": statutes enacted "at the turn of the century to force Indians onto individual allotments carved out of reservations and to open up unallotted lands for non-Indian settlement." 465 U.S. at 467. As *Solem* recognized, "each surplus land Act employ[s] its own statutory language, the product of unique set of tribal negotiation and

legislative compromise." *Id.* As Respondent discusses, the differences in the statutes here provide stronger evidence against reservation termination than presented in previous cases. Resp't Br. 27. In addition, even more clearly than in previous cases, Congress considered unambiguously terminating reservation status by obtaining a tribal cession of defined land in exchange for a sum certain, yet chose not to take that path.

The statutes at issue here were enacted during the same time period as those in previous reservation-boundary cases. This case concerns statutes enacted between 1893 and 1906; the eight earlier cases involved statutes enacted between 1882 and 1908. The Petitioner, however, tries to obscure the fact that he is asking this Court to find clear Congressional intent to disestablish the Creek Reservation despite the use of statutory language—sometimes by the same Congresses—that this Court has previously found insufficient.

The statutes at issue here are also clearly allotment statutes. The first statute is the 1893 authorization to seek allotment or cession of the lands of the Five Tribes, and the creation of a commission to negotiate the same. Act of Mar. 3, 1893, ch. 209, 27 Stat. 612, 645. Tellingly, the first head of this commission was former Senator Henry Dawes, so associated with allotment that the "Dawes Act" is an alternate name for the General Allotment Act. 2 Francis Paul Prucha, *The Great Father: The United States Government and the American Indians* 666-71, 748-49 (1984). Although Dawes

died in 1903, it remained the "Dawes Commission" that oversaw allotment of Five Tribes territories, and the "Dawes rolls" that identified those eligible for allotment. Allotment of the Indian Territory, in other words, was not an exception to the allotment policy, but the eponymous final project of its best-known architect.

The subsequent acts increasing federal and territorial authority and decreasing tribal authority were all integral components of a long process designed to coerce Creek agreement to allotment. The 1897 provision which extended federal judicial jurisdiction and U.S. law, as well as incorporating Arkansas law over all persons, comes at the end of a paragraph reciting the appropriations for and duties of the Commission negotiating allotment. Act of June 7, 1897, ch. 3, 30 Stat. 62, 83. The 1898 provisions of the Curtis Act abolishing tribal courts and preventing enforcement of tribal laws in U.S. courts come at the end of a long list of provisions regarding allotment, Act of June 28, 1898, ch. 517, §§ 11-26, 28, 30 Stat. 495, and before a section scheduling a Creek election at which, Congress hoped, the Creek people would finally agree to allotment. § 30, 30 Stat. at 514. Despite the incursions on Creek sovereignty, the election failed, resulting in yet another negotiated agreement in 1901. Act of Mar. 1, 1901, ch. 676, 31 Stat. 861. Even this agreement apparently did not settle matters, leading to a supplemental agreement that, among other things, made taxes on cattle grazing on unallotted lands mandatory, and imposed fines on those who grazed cattle on the Creek Nation

without a permit. Act of June 30, 1902, ch. 1323, § 17-18, 32 Stat. 500, 504. Both the 1901 and 1902 agreements were dependent on ratification by the Creek Nation and implementation by the Creek President. *See* § 28, 31 Stat. at 867-68; §§ 21-22, 32 Stat. at 505.

Like the acts construed in previous cases, the operative statutes also open certain lands to non-Indian purchase. All of the statutes provide for non-Indian purchase of lands within towns on the reservation. *E.g.*, 31 Stat. at 865. The Five Tribes Act, ch. 1876, 34 Stat. 137 (1906), the final statute regarding allotment, is even more comprehensive. By this time, the Supreme Court had ruled that tribal consent was not necessary to allot treaty lands. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903). The Five Tribes Act, therefore, broadly provides that all lands not otherwise disposed of "shall be sold by the Secretary of the Interior under rules and regulations to be prescribed by him and the proceeds of such sales deposited in the United States Treasury to the credit of the respective tribes." § 16, 34 Stat. at 143. This language is similar to the provisions regarding sales of unallotted lands in *Parker*, §§ 2-3, 22 Stat. at 341, and provides even stronger evidence of continued reservation status than the language construed in *Solem*, *Seymour*, and *Mattz v. Arnett*, 412 U.S. 481 (1973), which provide for sale according to homestead and other general laws. *See* Act of May 29, 1908, ch. 218, § 2, 35 Stat. 460, 461 (*Solem* act); Act of Mar. 22, 1906, ch. 1126, § 3, 34 Stat. 80, 80-81 (*Seymour* act); Act of June 17, 1892, ch. 120, 27 Stat. 52, 52-53 (*Mattz* act).

Despite Petitioner's ballyhoo that there is some uniform category of "surplus land acts," and the Creek statutes do not fall into it, not all statutes construed as surplus land acts even use the term. *Compare* § 2, 35 Stat. at 461 (*Solem* act, not using term surplus) *and* 27 Stat. at 52 (*Mattz* act, not using term surplus), *with* § 3, 34 Stat. at 80 (*Seymour* act, using term surplus). The Five Tribes Act does, however, specifically refer to unallotted lands as "surplus lands." § 16, 34 Stat. at 143.

The statutes at issue here also resemble other allotment acts in their treatment of allotments. Allotted lands are temporarily immune from taxes and encumbrances, but this immunity lifts after a period of time or for persons believed capable of managing their lands. *Compare* § 19, 34 Stat. at 144 (restricting lands owned by full-bloods for twenty-five years) *and* § 16, 32 Stat. at 503 (restricting allotments for five years, and homesteads for twenty-one years), *with* GAA, § 5, 24 Stat. at 389 (restricting allotments for twenty-five years) *and* Burke Act, ch. 2348, 34 Stat. 182, 183 (1906) (authorizing early lifting of restrictions for those "capable of managing his or her affairs"). Likewise, inheritance of allotted land is subject to state or territorial law. *Compare* § 6, 32 Stat. at 501, *with* GAA, § 5, 24 Stat. at 389. In addition, consistent with other allotments of the time, Creek allottees could temporarily lease their lands for limited purposes. *Compare* § 17, 32 Stat. at 504, *with* Act of May 31, 1900, ch. 598, 31 Stat. 221, 229. These policies did not constitute

diminishment in previous cases, and they do not do so here.

Congress knew full well how to diminish the Creek Reservation, and knowingly took another path. In the 1866 Treaty, the Creek Nation agreed to "cede and convey to the United States . . . the west[ern] half of their entire domain" in exchange for a lump sum of almost a million dollars. Treaty with the Creek Indians, art. III, 14 Stat. 785 (1866). This is like the cession and lump sum language the Court has found "precisely suited to terminating reservation status." *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 344 (1998). In 1893, however, Congress authorized the Dawes Commission to negotiate *either* "cession . . . to the United States" *or* "allotment and division . . . in severalty." § 16, 27 Stat. at 645. After finding "unanimity among the people against the cession of any of their lands to the United States," the Commission early on "abandoned all idea of purchasing any of it and determined to offer them equal division of their lands." J.A. 19. While the Commission admitted it would be simpler if the Five Tribes agreed to "a cession of the entire territory at a given price," there were "great difficulties" in even getting the Tribes to "accept allotment in severalty." J.A. 27-28. It therefore abandoned any efforts to seek reservation diminishment.

Again, this is familiar territory from other cases. The first modern diminishment decision held that a 1906 allotment act did not diminish the Colville reservation because while an earlier act had restored lands in the southern portion of the reservation to the public

domain, there was no similar language in the 1906 act. *Seymour*, 368 U.S. at 356. Similarly, in *Mattz v. Arnett*, the Court found that failed bills that would have terminated the Klamath Reservation "compel[] the conclusion" that a subsequent act did not do so. 412 U.S. at 504. Most recently, in *Parker*, the Court held that in 1882 "Congress legislated against the backdrop" of two earlier laws that diminished the Omaha Reservation "'in unequivocal terms.'" 136 S. Ct. at 1080 (citation omitted). As in *Seymour* and *Mattz*, the "change in language . . . undermine[d] petitioners' claim" that the 1882 act diminished the reservation. *Id.*

In short, what happened to the Creek Reservation was not exceptional. The statutes and their history reflect the distinct situation of the Creek Nation, but their key elements—allotting tribal territories, eventually lifting restrictions on sale and taxation, and selling other lands for the benefit of the tribe—are the same as those in this Court's previous cases. Their result—extensive non-Indian settlement—is the same as well. Even more than in previous cases, moreover, the statutes and their history contradict congressional intent to affect reservation boundaries. This Court's decisions from *Seymour* to *Parker* dictate how to interpret these statutes.

E. Neither State Jurisdiction nor Reduction in Tribal Authority is Inconsistent with Reservation Status.

The Petitioner argues that statehood, the diminishment of Creek authority, and comprehensive federal and state jurisdiction are inconsistent with reservation status. As Respondent has shown, the statutes at issue here themselves undercut this argument, by expressly preserving tribal and federal authority in the territory. Resp't Br. 32-35, 39-42, 45-48. But these arguments would fail even absent statutory rebuttal, because they are inconsistent with over a century of congressional policy and Supreme Court decisions—some even involving the Creek Nation itself.

Statehood is simply not inconsistent with reservation status. Before enacting the first of these statutes, Congress passed the Major Crimes Act providing that it applied on "any Indian reservation" and "within the boundaries of any State." § 9, 23 Stat. at 385. The Supreme Court quickly found that statehood was not a constitutional bar to federal jurisdiction on reservations, *Kagama*, 118 U.S. at 383-84, and reaffirmed this conclusion throughout the allotment period. *Thomas*, 151 U.S. at 585; *Donnelly v. United States*, 228 U.S. 243, 263 (1913). The Court later implicitly endorsed this conclusion with respect to the Creek Nation itself, finding that the fact that tax immunity of Creek allotments might "embarrass the finances of a state or one of its subdivisions" was irrelevant to

the question of whether tax immunity existed. *Bd. of Cnty. Comm'rs v. Seber*, 318 U.S. 705, 718 (1943).

Nor is the alleged existence of state jurisdiction inconsistent with reservation status. State jurisdiction over non-Indians on reservations was well-established before the passage of the laws at issue here. *United States v. McBratney*, 104 U.S. 621, 624 (1881) (holding states had exclusive jurisdiction over crimes between non-Indians). And allotment acts themselves often imposed state taxation on Indian-owned fee lands. *E.g.*, Burke Act, 34 Stat. at 183.

The consistency of state jurisdiction and reservation status has been reaffirmed in the modern era. In 1948, the same year Congress codified the definition of reservations, it also gave New York criminal jurisdiction over Indians "on Indian reservations" in the state. Act of July 2, 1948, ch. 809, 62 Stat. 1224. A few years later, as a result of Public Law 280, ch. 505, 67 Stat. 588 (1953), Indians in many states became subject to state civil and criminal jurisdiction. This Court nevertheless declared that Public Law 280 was not the equivalent of a termination statute, and relied on this Court's reservation boundary jurisprudence to find that "clear" language was still necessary to infer further intrusions on tribal sovereignty. *Bryan v. Itasca Cnty.*, 426 U.S. 373, 392-93 (1976) (quoting *Mattz*, 412 U.S. at 504-05).

Federal control over tribal governmental institutions also does not undermine reservation status. Although the Petitioner insists that the relevant

statutes contemplated dissolution of the Creek Nation, Pet'r's Br. 28-32, Congress explicitly repealed the dissolution provision, and never reenacted it. Act of Mar. 2, 1906, 34 Stat. 822, 822. With respect to the Creek Nation, this Court resoundingly declared, "[t]hat Nation still exists." *Seber*, 318 U.S. at 718. Furthermore, if federal jurisdiction and control over tribal governmental institutions were inconsistent with reservation status, there would be no reservations in the United States. *See United States v. Wheeler*, 435 U.S. 313, 327-28 (1978) (describing federal control over tribal courts); Prucha, *supra*, at 646-48 (describing federal control over tribal courts and police beginning in the 1870s). Federal control simply does not mean tribes lack sovereignty on their lands. *Wheeler*, 435 U.S. at 328.

In short, the argument that the relevant statutes are inconsistent with reservation status depends on propositions this Court has soundly rejected, sometimes with regard to the Creek Nation itself. They cannot decide this case.

II. RESERVATION STATUS WILL NOT BE DISRUPTIVE.

Petitioner's laments about the effect of reservation status are divorced from both federal Indian law and the realities of the Creek Nation. They ignore decades of jurisprudence holding that tribes generally lack jurisdiction and states have comprehensive jurisdiction over non-Indians on reservation fee land. They also ignore the wealth of intergovernmental agreements

between tribes, states, and municipalities—many of which the Creek Nation already has in place—that resolve jurisdictional uncertainty and help ensure that hundreds of predominantly non-Indian cities and towns thrive within reservations. Indeed, although Nebraska and Michigan join a brief focused on the difficulties of reservation status, they provide no examples of these difficulties from Pender, Nebraska, or Mount Pleasant, Michigan, cities recently affirmed to be on Indian reservations. With respect to law enforcement in particular, the addition of tribal and federal resources will likely result in better outcomes for both Indians and non-Indians on the Creek Reservation.

A. With Intergovernmental Cooperation, Predominantly Non-Indian Cities and Towns Thrive Within Reservations.

There are hundreds of predominantly non-Indian cities and towns within reservations. These communities experience many benefits from reservation status, including federal tax credits for non-Indian businesses and economic opportunities from doing business with Indian tribes. Decades of case law establish that for non-Indians in such communities, jurisdiction is little different than outside reservation boundaries. The rapidly growing number of agreements between tribal and non-tribal governments, moreover, cabins any remaining uncertainty, and ensures that overlapping jurisdiction in fact leads to more efficient services for both Indians and non-Indians.

To begin, it is important to note that reservation status does not affect jurisdiction over the vast majority of non-Indian activities on reservation fee land. On fee land—the only land affected by reservation status—tribal jurisdiction over non-Indians is "presumptively invalid." *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 330, 341 (2008) (rejecting tribal jurisdiction over sale of fee land); *see also Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 659 (2001) (rejecting tribal hotel occupancy tax); *Strate v. A-1 Contractors*, 520 U.S. 438, 459 (1997) (rejecting tribal court jurisdiction over wrongful death action); *Montana v. United States*, 450 U.S. 544, 564-65 (1981) (rejecting tribal jurisdiction over non-Indian fishing). State jurisdiction over non-Indians, in contrast, is presumptively valid absent meaningful federal and tribal involvement. *See, e.g., Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 185 (1989) (upholding state oil and gas severance taxes); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980) (upholding state cigarette taxes). Even with respect to tribal citizens, many federal allotment statutes authorize state and municipal property taxes on Indian-owned fee land. *E.g., Cnty. of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 258-59 (1992) (holding that GAA, as amended by the Burke Act, authorized taxation of allotments).[7]

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[7] At page 30 of its brief, Petroleum Amicus claim that if this Court acknowledges the Creek Reservation, their contracts with the tribe or its citizens may be void absent federal approval. This

This jurisprudence has been accompanied by an "increasing trend" toward intergovernmental agreements ensuring that jurisdictional overlap leads not to uncertainty, but to cooperation. *See* Conference of Western Attorneys General, *American Indian Law Deskbook* § 14.1 (2018). According to the Conference of Western Attorneys General, such agreements not only "resolve the core uncertainties" on jurisdiction, but also result in more effective service delivery. *Id.* § 14 Introduction; *see also Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 514 (1991) (noting that states can "enter into agreements with the tribes to adopt a mutually satisfactory regime for [tax] collection"). The National Conference of State Legislatures (NCSL) similarly reports that intergovernmental agreements are often "the best way to provide services to these unique populations without wasting valuable resources on ineffective programs." Susan Johnson et al., NCSL, *Government to Government: Models of Cooperation Between States and Tribes* 3 (2009).

Several states, including Oklahoma, have statutes broadly authorizing their officials to negotiate intergovernmental agreements with tribes.[8] Oklahoma's

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is simply incorrect. The Secretary of the Interior only approves a subset of contracts that relate to either trust lands or fee lands subject to restrictions on alienation. *See* 25 U.S.C. § 81; 25 C.F.R. § 212.30; 25 U.S.C. § 2102.

[8] *E.g.*, Idaho Code Ann. §§ 67-4001 to 67-4003; Mont. Code Ann. §§ 18-11-102 to 18-11-112; Neb. Rev. Stat. §§ 13-1501 to 13-1509; N.M. Stat. Ann. §§ 11-1-1 to 11-1-7; Wash. Rev. Code Ann. §§ 39.34.010 to 39.34.230.

statute notes that this cooperation is "in furtherance of federal policy for the benefit of both the State of Oklahoma and tribal governments." Okla. Stat. tit. 74, § 1221(B). The website of the Oklahoma Secretary of State lists hundreds of tribal-state agreements, including many on taxation and law enforcement. *See* Tribal Compacts and Agreements, https://www.sos.ok.gov/gov/tribal.aspx.

Like Oklahoma, "[n]early every state that has Indian lands within its borders has reached some type of tax agreement with the tribes." Judy Zelio, National Conference of State Legislatures, *Piecing Together the State-Tribal Tax Puzzle* (2005). Such agreements "benefit both governmental entities by streamlining the tax collection process and facilitating compliance with state and tribal law." Deskbook, *supra*, § 14.8. In family law, moreover, tribal-state cooperation is "vital for the thousands of American Indian and Alaska Native children who are over-represented in state and tribal welfare systems." Johnson, *supra*, at 72. In law enforcement, too, the Western Attorneys General report, cross-deputization creates relationships between "tribal and non-tribal police officers" that "can enhance the effectiveness of law enforcement." Deskbook, *supra*, § 14:10.

There are also distinct financial advantages to doing business in Indian country. Non-Indian businesses on reservations benefit from accelerated depreciation, 26 U.S.C. § 168(j), economic empowerment zone credits, 26 U.S.C. § 1391(g)–(h); 26 U.S.C. § 1392; 26 U.S.C. § 1396, and other incentives. *Cohen's*, *supra*, § 21.02[4] at 1330. Tribes themselves have become valuable

economic partners. They employ hundreds of thousands of Indians and non-Indians. In fact, many tribes are the largest employers in their regions, and are the lifeblood of areas where manufacturing jobs have disappeared. Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 Calif. L. Rev. 799, 833 (2007); *see also* Jonathan B. Taylor, *The Economic Impact of Tribal Government Gaming in Arizona* 9 (1999) (discussing the Tonto Apache Tribe, which became the largest employer in Payson, Arizona after a local lumber mill closed). This is true in Oklahoma, where individual tribal nations are the fourth, twelfth, twenty-third, thirty-second, and fifty-second largest employers in the state. Oklahoma Dept. Commerce, Oklahoma Employers—1,500 or more employees, 2018 State Ranking, https://okcommerce.gov/wp-content/uploads/2018/02/Oklahoma-Largest-Employers-List.pdf. Broad statistical and econometric analyses show that tribal businesses not only increase employment in surrounding areas, but also result in substantial income gains. Randall K.Q. Akee et al., *Social and Economic Changes on American Indian Reservations in California: an Examination of Twenty Years of Tribal Government Gaming*, 18(2) UNLV Gaming Res. & Rev. J. 39, 53-54, 57 (2014); Jonathan B. Taylor et al., *The National Evidence on the Socioeconomic Impacts of American Indian Gaming on Non-Indian Communities*, Harvard Project on American Indian Economic Development 19-23 (2000).

With cooperation, therefore, non-Indian cities thrive within reservation boundaries. The cities of

Tacoma, Washington, located partially within the Puyallup Reservation, and Mount Pleasant, Michigan, located within the Saginaw Chippewa Tribe's Reservation, provide telling examples. After generations of dispute, a federal settlement affirmed the boundaries of the Puyallup Reservation to include sizable portions of the over 200,000-person City of Tacoma and other predominantly non-Indian cities. *See* Puyallup Tribe of Indians Settlement Act of 1989, Pub. L. No. 101-41, 103 Stat. 83. Puyallup businesses include a casino, innovative health care facilities, a 400-slip marina, and retail stores and gas stations. *Tiller's Guide to Indian Country: Economic Profiles of American Indian Reservations* 991-92 (Veronica E. Velarde Tiller ed., 2d ed. 2005). The Tribe contributes millions of dollars each year to Tacoma and smaller non-Indian cities within the reservation, and it donates additional funds to area nonprofits.[9]

Having a core part of Tacoma within the Puyallup Reservation does not seem to have hurt the city. After suffering a post-industrial decline until the 1990s, Tacoma is now "experiencing unprecedented growth," becoming a center for private investment, higher education, and the arts. City of Tacoma, "About Tacoma," http://www.cityoftacoma.org/about_tacoma. Recognizing

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[9] *E.g.*, *Puyallup Tribal Impact: Supporting the Economic Growth of our Community*, http://www.jumapili.com/wp-content/uploads/2013/09/www.puyallup-tribe.com_assets_puyallup-tribe_documents_puyallupcommunityreport_2012_web.pdf (describing extensive Tribal donations); *High-energy elder*, The News Tribune (July 7, 2008) (noting that the Puyallup Tribe is one of the largest donors to charity in Pierce County).

the value of its reservation status, Tacoma permanently installed the Puyallup Nation flag in the Tacoma City Council Chambers this summer. Courtney Wolfe, *Puyallup Nation Flag Now a Permanent Fixture in Downtown Tacoma*, South Sound Magazine, Aug. 1, 2018, https://southsoundmag.com/puyallup-nation-flag-now-a-permanent-fixture-in-downtown-tacoma/.

In 2010, the boundaries of the Saginaw Chippewa Tribe's Reservation, which include the City of Mount Pleasant, were affirmed. *See Saginaw Chippewa Indian Tribe v. Granholm*, No. 05-10296-BC, 2010 WL 5185114 (E.D. Mich. Dec. 17, 2010). While settling its boundary dispute, the Tribe negotiated detailed agreements with Michigan, Isabella County, and Mount Pleasant covering child welfare, law enforcement, zoning, land use, natural resources, and taxation. *Id.* at *1. In approving the settlement, the district court lauded the parties for providing "greater certainty and stability for the parties and their constituents." *Id.* at *4. Today, with over 3,000 employees, the Tribe is the largest employer in Isabella County, larger even than Central Michigan University. Middle Michigan Development Corporation, Top Employers, https://mmdc.org/site-selectors/top-employers/. In addition to funding tribal health and welfare programs, the Tribe has distributed over $249 million to schools and local governments since 1994. *Tribe distributes $2,946,602.98 for the 2018 spring 2 percent cycle*, 29(6) Tribal Observer 1 (June 2018), *available at* http://www.sagchip.org/tribalobserver/archive/2018-pdf/060118-v29i06.pdf.

As Tacoma and Mount Pleasant demonstrate, reservation status can be a boon, not a burden. Across the country, tribal nations are working with states, municipalities, and private entities to build better economies and communities. This cooperation does more than resolve legal uncertainty; it ensures that by working together, governments can improve services and opportunities for all of their citizens.

B. Affirmance Can Improve Law Enforcement on the Creek Reservation.

Reservation status does change criminal jurisdiction in certain cases, but change is badly needed. Oklahoma has one of the highest violent crime rates in the country, and Tulsa has one of the highest violent crime rates in the State. *See, e.g.*, Federal Bureau of Investigation, *Crime in the United States*, Tables 3, 6 (2016), *available at* https://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s.-2016/topic-pages/violent-crime (publishing data establishing that in 2016, Oklahoma had the fifteenth most violent crime reports in the nation, while Tulsa had the second most violent crime reports within the State). Affirming reservation status will enhance the intergovernmental cooperation already occurring, remove the need to search tract books to determine jurisdiction, and make available much-needed tribal and federal resources.

Oklahoma will continue to play the central law enforcement role within the boundaries of the Creek Reservation. Regardless of reservation status, states

have jurisdiction over non-Indians committing crimes against non-Indians, *Draper v. United States*, 164 U.S. 240 (1896), and victimless crimes. *Solem*, 465 U.S. at 465 n.2. The vast majority of the crimes committed within the Creek Reservation will, therefore, remain under state jurisdiction. *See* Oklahoma State Bureau of Investigation, *Crime in Oklahoma*, 2-5 to 2-14 (2017), http://osbi.ok.gov/publications/crime-statistics (noting that less than eight percent of persons arrested for violent crimes are American Indian).

Affirmance, however, makes additional tribal and federal resources available. The federal government can prosecute cases involving Indians throughout the reservation, rather than solely on trust or restricted-fee parcels. 18 U.S.C. § 1153 (jurisdiction over major crimes by Indians); 18 U.S.C. § 1152 (jurisdiction over crimes between Indians and non-Indians). If the defendant is Indian, the Creek Nation may prosecute as well. 25 U.S.C. § 1301(2). While no police force anywhere has enough funding, reservation status will also unlock federal funding sources targeting crime in Indian country. *See, e.g.*, 25 U.S.C. § 5412 (establishing Indian Law Enforcement Foundation); U.S. Dept. Justice, Fact Sheet: Fiscal Year 2018 Coordinated Tribal Assistance Solicitation, https://www.justice.gov/tribal/page/file/913416/download (describing over $823 million in grants to address Indian country crime).

Recognizing Creek law enforcement authority on the reservation will also further Congress's position that "tribal justice systems are often the most appropriate institutions for maintaining law and order in

Indian country." Tribal Law and Order Act of 2010, Pub. L. No. 111-211, Title II, § 202(a)(2)(b), 124 Stat. 2258. Accordingly, Congress has enhanced tribal criminal jurisdiction twice in recent years. *Id.* at §§ 213, 233-234; Violence Against Women Act Amendments of 2013, Pub. L. No. 113-4, § 904, 127 Stat. 54. The federal Indian Law and Order Commission similarly concluded that tribal governments are the institutions "best positioned to provide trusted, accountable, accessible, and cost-effective justice in Tribal communities." Indian Law & Order Comm'n, *A Roadmap for Making Native America Safer: Report to the President & Congress of the United States*, at v (2013). Affirmance will further this federal policy.

Studies of Public Law 280 provide evidence of the positive impact of affirmance. Today, criminal jurisdiction on the Reservation outside trust lands and restricted allotments in Oklahoma is analogous to that in P.L. 280 states, where states have primary criminal jurisdiction over reservation Indians. *See* 18 U.S.C. § 1162. While one might assume that uniform state jurisdiction would make law enforcement easier, the Indian Law and Order Commission found that P.L. 280 reservations actually face more problems from "institutional illegitimacy and jurisdictional complexity" than other reservations. *Roadmap*, *supra*, at 11-13. A more targeted study found that P.L. 280 reservation residents rated police less available, slower in response time, culturally insensitive, and less able to provide community policing than those on non-P. L. 280 reservations. Carole Goldberg et al., *Final Report: Law*

Enforcement and Criminal Justice under Public Law 280, 112, 476-79 (2007), https://www.ncjrs.gov/pdffiles1/nij/grants/222585.pdf.

Meanwhile, a growing body of evidence demonstrates that delivery of governmental services to tribal members is enhanced when tribes are able to take control over such programs themselves. *See, e.g.*, Rupinder Kaur Lægha & Douglas Novins, *The Role of Culture in Substance Abuse Treatment Programs for American Indian and Alaska Native Communities*, 63(7) Psychiatric Servs. 686, 691 (2012) (concluding that tribal culture "should be integrated into substance abuse prevention and treatment" to improve its efficacy); Alyce S. Adams et al., Governmental Services and Program: Meeting Citizens' Needs, *Rebuilding Native Nations: Strategies for Governance and Development* 223 (2007). The Creek Nation is particularly poised to be an effective partner in reservation law enforcement, possessing a robust police force, sophisticated judicial system, numerous prevention and rehabilitation programs, and cross-deputization agreements with the United States, Oklahoma, and local governments throughout the Reservation.

In addition, because the area is already interspersed with trust land and restricted allotments, reservation status eliminates the need for "law enforcement officers . . . to search tract books in order to determine . . . criminal jurisdiction over each particular offense." *Seymour*, 368 U.S. at 358. Amnesty International found that this process contributes to the crisis of sexual violence against Native women. According to Amnesty's

2007 Report, "[i]n Oklahoma, confusion around jurisdictional boundaries means it is not always immediately clear whether a case should be prosecuted by a tribal prosecutor, a federal prosecutor or a state prosecutor . . . [C]ourts may take years to determine whether the land in question is tribal or not." Amnesty Int'l, *Maze of Injustice: The Failure to Protect Indigenous Women from Sexual Violence in the USA* 62 (2007). Removing this jurisdictional uncertainty should allow more effective policing and more timely justice.

In short, reservation status, by enhancing tribal, state, and municipal cooperation, and increasing law enforcement resources, could improve law and order for all concerned.

CONCLUSION

The judgment of the United States Court of Appeals for the Tenth Circuit should be affirmed.

Respectfully submitted,

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